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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

SENECA NATION, a federally recognized Indian tribe,

Plaintiff,

v.

Andrew CUOMO, in his official capacity as Governor of New York, *et al.*,

Defendants.

Case No. 1:18-cv-429

SENECA NATION'S OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

INTRODUCTION

Plaintiff Seneca Nation hereby objects to the following specific matters in Magistrate Judge Hugh B. Scott's December 19, 2018 Report and Recommendation, Dkt. 29 ("R&R"): (1) the portions of the R&R recommending that this Court dismiss the complaint on the ground of issue preclusion, *see* R&R 14-16; (2) the portions of the R&R declining to accept as true all of the well-pleaded factual allegations (and favorable inferences therefrom) on a motion to dismiss, *see* R&R 2-4, 15-16; and (3) the R&R's failure to find that the Nation adequately pleaded claims seeking prospective relief for ongoing violations of federal law under *Ex parte Young*, 209 U.S. 123, 160 (1908).

Defendants purport to hold a disputed right-of-way across Seneca Nation's Cattaraugus Reservation on which the New York Thruway operates. The Nation has long maintained that the easement is invalid because it was obtained in violation of federal law, and accordingly that the continued operation of the Thruway violates the Nation's treaty rights and other federal laws; in fact, in prior litigation, Magistrate Judge Carol E. Heckman found "undisputed" that New York failed to comply with federal law when it obtained the putative easement. Through this current lawsuit, the Nation does not seek to interfere with the ongoing operation of the Thruway, but rather simply seeks injunctive and other equitable relief to require Defendants to obtain a valid easement and thus bring operation of the Thruway into compliance with federal law.

The Magistrate Judge held that this suit should be dismissed on the ground of issue preclusion, but that doctrine applies only when an *identical* issue was previously raised, litigated, and decided on the merits in a prior suit. The issue presented in this suit—whether the Nation may bring equitable claims against New York officials under the *Ex parte Young* doctrine to end ongoing violations of federal law related to this right-of-way—has never been raised or litigated

in any prior lawsuit. The prior claim to which the Magistrate Judge gave preclusive effect, by contrast, was not based on *Ex parte Young*, was not asserted against state officials, was not limited to prospective equitable relief, and was not decided "on the merits" of any final judgment (as issue preclusion requires). Because the prior litigation did not decide any issues presented in the current lawsuit, issue preclusion does not apply.

Indeed, the Nation's claim in the prior suit was dismissed solely on a procedural ground: Because New York was an indispensable party under Federal Rule of Civil Procedure 19 and declined to waive sovereign immunity, the claim could not proceed. In this case, however, the parties agree that issue preclusion does not bar a party from filing a new lawsuit that cures a Rule 19 defect. And it has long been established that one permissible way to "cure" a Rule 19 defect in situations like this is to sue the state officials responsible for the federal-law violation under *Ex parte Young* in lieu of the State itself. Accordingly, issue preclusion does not bar the Nation from filing this *Ex parte Young* lawsuit that cures the procedural defect that led to the prior dismissal.

Rather than engage with those arguments, the Magistrate Judge erroneously assumed that the Nation could not question the easement's validity in this suit—even though no prior judgment has ruled on the easement's validity, and in spite of the Nation's well-pleaded factual allegations demonstrating that Defendants obtained no valid easement. The Magistrate Judge erred again in refusing to find, contrary to Defendants' arguments, that the Nation adequately stated a claim upon which relief can be granted under *Ex parte Young*. In light of all of these errors, and on *de novo* review, this Court should reject the Magistrate Judge's recommendation, deny Defendants' motion to dismiss, and allow the Nation's claims to proceed.

BACKGROUND

A. Historical Background

The case concerns a right-of-way over reservation lands that have been protected by federal law since at least 1794, when the United States formalized the Nation's ownership and possession of the land via the Treaty of Canandaigua (Treaty with the Six Nations, 1794), Nov. 11, 1794, 7 Stat. 44. *See Citizens Against Casino Gambling in Erie Cty. v. Chaudhuri*, 802 F.3d 267, 272 (2d Cir. 2015). The treaty provided that "[t]he land of the Seneca Nation is . . . to be the property of the Seneca Nation," which shall not be disturbed "in the free use and enjoyment thereof." *See* Compl. ¶ 3; *see* 7 Stat. at 45 (United States acknowledging that lands are "the property of the Seneka [N]ation . . . until they choose to sell [them]," and promising to "never claim the same [lands]"). Although subsequent treaties, including the Treaty of Big Tree (Agreement with the Seneca, 1797), Sept. 15, 1797, 7 Stat. 601, decreased the Nation's land base, the Nation has always owned the Cattaraugus Reservation lands at issue in this case in restricted fee, subject to federal restraints on alienation. *See* Compl. ¶ 17; *see also Banner v. United States*, 238 F.3d 1348, 1351 (Fed. Cir. 2001).

Beginning in the 1940s, the State of New York began constructing a major Thruway. Amidst a postwar development boom in New York, Compl. ¶ 24, state officials were subjected to intense lobbying pressure by financial interests, transportation companies, and local chambers of commerce to extend the Thruway from Buffalo, New York, to Erie, Pennsylvania. That decade also coincided with the "termination era" of federal Indian policy, which was characterized by policies aimed at ending the trust relationship between the United States and Indian nations, permitting greater state influence over Indians, ending the political existence of Indian nations, removing restrictions on the alienation of Indian lands, breaking up reservations, and relocating

Indians to off-reservation lands." *Id.* ¶ 19. State officials viewed Seneca lands as potential "sacrifice areas" when situated in the path of these development goals. *Id.* ¶ 24.

In April 1954, the Governor of New York publicly announced that a link between Buffalo and Erie would be built. *Id.* ¶ 30. Having done so, state officials had no choice but to seek an easement over the Nation's Cattaraugus Reservation. Because that Reservation abuts Lake Erie, New York's only direct route would effectively bisect the Reservation.

On October 5, 1954, after a brief, coercive negotiation between the State's lead negotiator and the Nation's state-appointed (and inexperienced) legal counsel, the Nation purported to convey a permanent easement over approximately 300 acres of the Cattaraugus Reservation for the Thruway. *Id.* ¶ 15. Afterwards, the State's lead negotiator stated that after "several hours of very frank talk," he was able to get the Nation "hammered down to a [one-time payment] of $75,000," which was "*much lower than any of us expected to acquire these lands for*[.]" *Id.* ¶ 32 (emphasis added). No federal official participated in the negotiations or approved the purported easement, as federal law expressly required. *See* 25 U.S.C. § 177 (1949) (no land purchase or conveyance "from any Indian nation or tribe of Indians, *shall be of any validity in law or equity*, unless the same be made by treaty or convention entered into pursuant to the Constitution") (emphasis added); *see also* 25 U.S.C. § 323 and 25 C.F.R. Pt. 169 (governing valid rights-of-way across Indian lands). Today, New York operates the Thruway across the Cattaraugus Reservation without the consent of the Nation and without remitting any of the toll monies it collects to the Nation.

B. Prior Litigation Regarding the Thruway Easement

In 1993, the Nation filed a lawsuit in this Court that originally asserted two counts. The "first count—which concerned ownership of certain land including Grand Island, New York—is not relevant to any issues presented" in the present lawsuit. R&R at 4. The second count

challenged the operation of the Thruway over the Nation's reservation in violation of federal law. Unlike the Grand Island land claim, which, as amended, was brought against a variety of state officials, *see* Second Amended Complaint ("SAC"), No. 93-cv-688A (W.D.N.Y. Oct. 15, 1997), Dkt. 112, the Nation's second count was asserted against only three defendants: the Thruway Authority, its Executive Director, and New York. *See id.* ¶ 36.

After the parties filed cross-motions for summary judgment, Magistrate Judge Heckman issued a report and recommendation. That report first analyzed whether, as a factual matter, the Secretary of the Interior validly approved New York's easement. Magistrate Judge Heckman, siding with the Nation, found it "undisputed" that the federal regulatory requirements for obtaining a valid right-of-way "were never met." *See* 1999 Report & Recommendation at 11 ("1999 R&R"), No. 93-cv-688A (W.D.N.Y. Jul. 12, 1999), Dkt. 29-2. Although "[t]hese regulatory requirements must be complied with in order to obtain a valid right-of-way across Indian land . . . [i]t is undisputed that they were not complied with in this case." *Id.*

Magistrate Judge Heckman nevertheless recommended that the Nation's Thruway claim be dismissed under Rule 19, because New York was an indispensable party that could not be joined because it declined to waive sovereign immunity. *See id.* at 14-23; Memorandum in Support of Motion for Summary Judgment at 7-20, No. 93-cv-688A (W.D.N.Y. Feb. 10, 1999), Dkt. 235. This Court (Judge Arcara) adopted the Magistrate's ruling that the State was an indispensable party, without addressing whether the easement was obtained in compliance with federal law. *See* Order at 2-3, No. 93-cv-688A (W.D.N.Y. Nov. 18, 1999), Dkt. 244.[1] Because the Nation did not assert the Thruway claim against any state official and the relief the Nation sought was not limited to prospective relief, neither the Magistrate Judge nor this Court addressed whether an *Ex parte Young*

[1] A copy of Judge Arcara's decision is appended here for the Court's reference.

suit could be brought against state officials in the State's absence.

On appeal, the Second Circuit affirmed the district court's order of dismissal "under Rule 19(b) [because] the action could not proceed against the Thruway Authority and its executive director in the State's absence." *Seneca Nation of Indians v. New York,* 383 F.3d 45, 47-49 (2d Cir. 2004). Like this Court, the Second Circuit neither addressed Magistrate Judge Heckman's findings related to the validity of the easement, nor opined on whether the indispensability defect requiring dismissal could be cured by re-pleading the claim against state officials under *Ex parte Young*.

C. Current Litigation

In the years following dismissal, the Nation took a series of steps—both legal and political—to vindicate its rights, but was rebuffed by New York at every turn. For example, the Nation's Council passed a series of resolutions that, among other things, asked the Thruway Authority to collect tolls on behalf of the Nation for the use of its lands, but the Thruway Authority refused. Compl. ¶ 40. The Nation also sued to invalidate the easement in the Nation's Peacemakers Court, but was forced to accept a default judgment after neither New York nor the Thruway Authority appeared. To date, New York has steadfastly refused to address the ongoing violation of federal law, or even to approach the negotiating table.

Finding no recourse elsewhere, the Nation returned to this Court by filing a new complaint in April 2018. Because the original litigation ended in a Rule 19 procedural dismissal for failure to join an indispensable party (rather than a judgment on the merits), the Nation intentionally pleaded its new claims to cure that defect. Specifically, rather than filing suit against the same defendants sued in 1993 (the Thruway Authority, the Thruway Executive Director, and the State of New York), the Nation's new action sued the Thruway Authority along with a different group of defendants—the Governor of the State of New York, the New York State Attorney General, the

Acting Commissioner of the New York State Department of Transportation, and the Comptroller of the State of New York.[2] These individuals have authority separately and collectively to obtain valid easements for the State and to account for Thruway toll money, yet have failed to obtain a valid easement for the Thruway or to segregate any portion of tolls for the Nation. Compl. ¶ 41.

In addition, rather than seeking the forms of relief sought in 1993—specifically, damages, ejectment, and accompanying declaratory relief—the Nation now seeks different and far more limited relief: (1) an injunction requiring Defendants to obtain a valid easement (or an order enjoining them from collecting tolls absent a valid easement); (2) an injunction requiring the New York Comptroller to segregate and hold in escrow future toll monies collected on the Thruway attributable to the portion of the Thruway operated in violation of the Nation's rights; and (3) a declaration specifying that Defendants are violating federal law by failing to obtain a valid easement, and that some of the funds being collected are derived from this violation of law.

Defendants moved to dismiss, arguing, among other things, that the new claims were barred on claim- and issue-preclusion grounds; that they do not fit within *Ex parte Young*; and that they were filed too late in any event.

On December 19, 2018, the Magistrate Judge issued a Report and Recommendation recommending that this Court grant Defendants' motion to dismiss the complaint under the doctrine of issue preclusion. Even though the Nation's current action brings different claims under a different legal theory against different defendants, the Magistrate Judge concluded that the "1993 Case and this case are identical in all substantive ways concerning the Thruway Easement." R&R at 15. Rather than applying the elements of the issue preclusion doctrine set forth by the Second

[2] The individuals sued in their official capacity are Governor Andrew Cuomo, Acting Transportation Commissioner Paul A. Karas, Comptroller Thomas P. DiNapoli, and Attorney General Letitia James, who was substituted automatically in place of her predecessor in office. *See* FED. R. CIV. P. 25(d); R&R at 10 n.5.

Circuit, the Magistrate Judge erroneously recast the inquiry in his own terms: first, "[t]he Thruway Easement exists, and the documentation establishing it appears to be at least facially valid"; second, "[t]he State of New York owns the Thruway Easement"; third, New York must have an opportunity to appear and defend itself in this lawsuit because "[a]ny attack on the validity of the Thruway Easement is an attack on its owner's rights"; and fourth, "the State of New York cannot appear here because of sovereign immunity." *See id.* at 15-16. Because the Magistrate believed he could not proceed "without first negating one or more of the above points," he concluded that "[t]hat is enough to establish collateral estoppel and to require dismissal." *Id.* at 16. In so doing, he neither distinguished nor cited the Nation's proffered authority establishing that a Rule 19 failure to join an indispensable, immune party may be cured by suing the state officials responsible for the ongoing federal-law violation under *Ex parte Young*.

STANDARD OF REVIEW

This Court reviews *de novo* any portion of a report and recommendation to which a specific objection is made. *See* 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b)(3); *Singh v. N.Y. State Dep't of Taxation & Fin.*, 865 F. Supp. 2d 344, 348 (W.D.N.Y. 2011). The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge" and "may also receive further evidence or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1)(C).

This Court considers a Rule 12(b)(6) motion "'accepting all factual allegations in the complaint and drawing all reasonable inferences in the plaintiff's favor.'" *Perez v. Does*, 209 F. Supp. 3d 594, 597 (W.D.N.Y. 2016) (citing *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008)). "[A] court generally may consider only 'facts stated in the complaint or documents attached to the complaint as exhibits or incorporated by reference.'" *Id.* at 597 (quoting *Nechis v.*

Oxford Health Plans, Inc., 421 F.3d 96, 100 (2d Cir. 2005)).

OBJECTIONS

I. THE MAGISTRATE JUDGE ERRED IN FINDING THE NATION'S CLAIMS BARRED BY ISSUE PRECLUSION

The Magistrate Judge erred in recommending that issue preclusion (also known as collateral estoppel) should bar the Nation from raising an issue that was neither litigated nor decided in any prior litigation—namely, whether, in the State's absence, the Nation may bring claims for ongoing violations of federal law against the state officials responsible for those violations under the doctrine of *Ex parte Young*.

The affirmative defense of issue preclusion "bars relitigation" of identical issues that have "already been fully and fairly litigated in a prior proceeding." *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 400 (2d Cir. 2011). It applies only "when (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." *Id.*

Rather than considering whether all (or even one) of these elements were satisfied, the Magistrate Judge simply brushed them aside, concluding that "[t]he key to applying collateral estoppel here" is that "the 1993 Case and this case are identical in all substantive ways concerning the Thruway Easement." R&R at 15. In fact, as a review of the Nation's allegations here demonstrates, the Nation's claims satisfy none of the issue-preclusion elements: By suing different defendants for different relief under a different legal theory, the Nation raises an issue that has never been raised, litigated, or decided on the merits in any prior judgment.

A. The Issue Of Whether The Nation's Claims May Proceed Against State Officials Under *Ex parte Young* Has Never Been Raised, Litigated, or Decided In A Prior Proceeding

Issue preclusion applies only when an *identical* issue was *actually raised* in a prior proceeding. *See Republic of Ecuador*, 638 F.3d at 400. "If the issues [are] not identical, there is no collateral estoppel," and the suit may proceed. *Id*. Here, the Nation's claims raise an issue that has never been raised, litigated, or decided in a prior proceeding: Whether the Nation's equitable claims against New York officials for ongoing violations of federal law may proceed under *Ex parte Young*. Accordingly, issue preclusion does not bar the Nation's claims as a matter of law.

1. Ex parte Young *is a legal "fiction" that allows federal-law claims to proceed against the officials of otherwise-immune defendants.*

Under the venerable *Ex parte Young* doctrine, the Eleventh Amendment does not bar actions seeking "prospective injunctive relief against state officials to prevent a continuing violation of federal law because a state does not have the power to shield its officials by granting them 'immunity from responsibility to the supreme authority of the United States.'" *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 371-372 (2d Cir. 2005) (quoting *Ex parte Young*, 209 U.S. at 160). The doctrine rests on a "fiction," namely, "that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). In this way, the *Ex parte Young* doctrine "has existed alongside [the Supreme Court's] sovereign-immunity jurisprudence for more than a century, accepted as necessary to 'permit the federal courts to vindicate federal rights,'" *id.* at 254-255, including civil rights, against otherwise-immune State defendants. *See, e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 289-290 (1977) (remedial order involving school busing against state and local officials permissible under *Ex parte Young*).

The Magistrate Judge suggested that *Ex parte Young* cannot apply here because "the State

of New York must have an opportunity to appear and to defend its rights." R&R at 15. But that reflects a critical misunderstanding of the *Ex parte Young* doctrine, the very purpose of which is to ensure that federal rights may be vindicated in suits against state officials (who adequately represent the State's interests) in lieu of the State itself. *See, e.g.*, *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1181 (9th Cir. 2012) (tribal officials were adequate representatives of the tribe's interest in a lease to which it was a signatory, as "a contrary holding would effectively gut the *Ex parte Young* doctrine").

In fact, this Court has previously recognized the Nation's right to bring similar claims against responsible state officials under *Ex parte Young* to challenge New York's unlawful appropriation of reservation land. *See Seneca Nation of Indians v. New York*, 397 F. Supp. 685, 686-687 (W.D.N.Y. 1975). Although New York (as here) enjoyed sovereign immunity, this Court expressly recognized that, under *Ex parte Young*, "an Indian Tribe is not prohibited by the [E]leventh [A]mendment from suing to enjoin the actions of a state official which conflict with treaty rights," including the Nation's "right to the unrestricted use and occupancy of" its reservation lands. *Id.* at 685, 686. This decision—which was presented to, but not cited by, the Magistrate Judge, *see* Letter Informing Magistrate Judge of Supplemental Authority, Dkt. 26, demonstrates why this suit should have been permitted to proceed despite New York's absence.

2. A claim under Ex parte Young *against state officials may proceed even if the State would otherwise be deemed indispensable.*

Because the *Ex parte Young* fiction creates an exception to the Eleventh Amendment, courts have consistently held that an immune sovereign is *not* a necessary party under Rule 19 when plaintiffs sue the officials responsible for the ongoing federal-law violation under *Ex parte Young* instead. Writing for the D.C. Circuit, then-Judge Kavanaugh recognized that every circuit to have addressed the issue is in accord. *See Vann v. U.S. Dep't of Interior*, 701 F.3d 927, 929-930 (D.C.

Cir. 2012). Because a sovereign and its responsible officials are "one and the same" in an *Ex parte Young* suit, a claim may proceed against those officials under *Ex parte Young* even in the immune party's absence:

> As a practical matter, . . . the Cherokee Nation and the Principal Chief in his official capacity are one and the same in an *Ex parte Young* suit for declaratory and injunctive relief. As a result, the Principal Chief can adequately represent the Cherokee Nation in this suit, meaning that the Cherokee Nation itself is not a required party for purposes of Rule 19.

Id. The D.C. Circuit reasoned that if it were to reach a different result, "official-action suits against government officials would have to be routinely dismissed," yet "that is not how the *Ex parte Young* doctrine and Rule 19 case law has developed." *Id.* at 930.

Similarly, in *Salt River Project Agricultural Improvement*, 672 F.3d at 1181, the Ninth Circuit rejected the argument that under Rule 19 a tribe "automatically is a necessary party to any action challenging a lease to which the tribe is a signatory," given that responsible tribal officials could always be sued in lieu of the sovereign under *Ex parte Young*. The Ninth Circuit concluded that "a contrary holding would effectively gut the *Ex parte Young* doctrine." *Id.*; *accord Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1236 (10th Cir. 2014); *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001).

Finally, in *Nisqually Indian Tribe v. Gregoire*, a federal district court held that even though a defendant tribe possessed sovereign immunity and was also an indispensable party (as a signatory to the compact at the center of the dispute), the plaintiff could "cure the indispensability defect" by suing the responsible official of the sovereign instead of the sovereign itself. No. 08-5069-RBL, 2008 WL 1999830, at *3 (W.D. Wash. May 8, 2008).

The reason that claims like these can be re-pleaded is due to "the long-settled rule that the dismissal [under Rule 19] does not bar a new action that corrects the deficiency of parties." 18A

CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4438; *see also Schwan-Stabilo Cosmetics GmbH & Co. v. Pacificlink Int'l Corp.*, 401 F.3d 28, 35 (2d Cir. 2005) (dismissal under Rule 19 is "without prejudice"). Defendants never cited any contrary authority; instead, they conceded that because a Rule 19 "dismissal is without prejudice, the plaintiff may bring a new action if it cures the earlier infirmity." Reply Mem. in Supp. of Mot. to Dismiss at 4 ("Reply"), Dkt. 23. Although Defendants believed that the Nation could only "cure the infirmity" by suing New York itself, *see id.*, that ignores the precedent above demonstrating that bringing an *Ex parte Young* suit is a well-established way to "cure" a Rule 19 dismissal.

3. The issue of whether New York was a necessary party in the prior action is distinct from whether the Nation's claims may proceed against state officials under Ex parte Young.

The Magistrate Judge necessarily assumed that the issue of whether New York was an indispensable party to the Nation's earlier claim is identical to whether the claims in this new suit may proceed against state officials under *Ex parte Young* instead. But those two issues are clearly distinct, and issue preclusion does not prevent the Nation from curing the Rule 19 indispensable-party defect that led to the prior dismissal.

In the prior litigation, the issue that was actually litigated and decided was that the dismissal of the Nation's claim against New York, the Thruway Authority, and its Executive Director must be upheld "under Rule 19(b) [because] the action could not proceed *against the Thruway Authority and its executive director* in the State's absence." *Seneca Nation*, 383 F.3d at 47 (emphasis added); *see id.* at 48 (asking "whether in equity and good conscience the action should proceed *among the parties before [the Court]*, or should be dismissed") (emphasis added). The issue was not, as the Magistrate Judge mistakenly reasoned, whether "*any* attack on the validity of the Thruway Easement" could be brought in *any* proceeding against *anyone*. And the Court certainly did not

decide the specific issue presented here, regarding whether the Nation's current *Ex parte Young* claims against state officials may proceed in New York's absence. *Cf. Vann*, 701 F. 3d at 929-930 (an immune sovereign "is not a required party for purposes of Rule 19" where a responsible official "can adequately represent" the sovereign).

The differences in parties and relief shows why the issues decided in the two suits are not identical. Rule 19 determinations "are case specific," because the Rule directs courts to ask "whether 'in equity and good conscience, the action should proceed *among the existing parties* or should be dismissed.'" *Republic of Philippines v. Pimentel*, 553 U.S. 851, 862-863 (2008) (emphasis added) (quoting FED. R. CIV. P. 19(b)). "The design of the Rule, then, indicates that the determination whether to proceed will turn upon factors that are case specific, which is consistent with a Rule based on equitable considerations." *Id.* at 862-863. Given Rule 19's narrow scope, the Magistrate Judge erred in interpreting the holding to sweep in this case and "any" other case involving the validity of the Thruway easement, regardless of the named defendants, the relief sought, or the basis for jurisdiction.

Indeed, the prior litigation could *not* have resolved the identical issue of whether an *Ex parte Young* could proceed against Defendants in lieu of New York for a simple reason: Unlike this suit, which pleads claims against the state officials responsible for the ongoing violation of federal law, the easement claim in the prior suit was pleaded solely against New York, the Thruway Authority, and its Executive Director. *See* SAC ¶ 36 ("The defendants State of New York, New York Thruway Authority and John R. Platt, Executive Director of the New York Thruway Authority are trespassers upon the land in violation of the law."); 1999 R&R at 16 (recognizing that "[t]he Thruway Authority and its Executive Director," but not other defendants, seek dismissal of the Thruway count on Rule 19 indispensability grounds); *see also Seneca Nation,* 383 F.3d at

47 (issue was whether "under Rule 19(b) the action could not proceed *against the Thruway Authority and its executive director* in the State's absence"). And because the Thruway Director and its Executive Director are not state officials protected by the Eleventh Amendment, *see Seneca Nation*, 383 F.3d at 47, neither this Court nor the Second Circuit had occasion to determine whether a claim could hypothetically proceed against state officials in New York's absence. Needless to say, that hypothetical is the precise nature of this suit, which was expressly designed to cure the defect that led to the prior dismissal.

4. The Nation has never raised or litigated, and no court has decided, whether these claims may proceed against state officials under Ex parte Young.

Given that the Nation may cure a Rule 19 dismissal by bringing claims against state officials under *Ex parte Young* in lieu of the State itself, the only way issue preclusion would come into play is if the Nation had actually raised—and the Court had actually rejected—that identical issue in the prior lawsuit. But not even Defendants contend that the Nation did so.

It is true that the Magistrate Judge implied (though never held) that the Nation raised the identical issue in the prior litigation. *See* R&R at 6 (citing archived brief excerpts discussing *Ex parte Young* "[f]or reasons that will become apparent later"). But that is incorrect: The Magistrate's quoted brief excerpts came solely from briefing relating to the Grand Island land claim, which the R&R elsewhere notes "is not relevant" (*id.* at 4) to the present case. *See id.* at 6-7 (quoting from Dkts. 134 and 135). The passages the Magistrate quoted, moreover, were not filed by the Nation, but rather by a third-party Defendant. *See id.* at 6-8 (quoting briefs filed by "Moore Business Forms, Inc.").

Thus, although the parties addressed *Ex parte Young*'s impact on the (irrelevant) Grand Island land claim, the Nation neither raised, nor tried to raise, any issue regarding whether it could

successfully plead a Thruway claim against a responsible state official under *Ex parte Young*.[3] Accordingly, that never-raised issue is not subject to issue preclusion.

B. The Issue Of Whether The Nation's Claims May Proceed Against State Officials Under *Ex parte Young* Was Not Part Of A Final Judgment "On The Merits"

Even if an identical issue was somehow deemed actually "raised," "litigated," and "decided" in the prior action, it *still* would not be precluded for an additional reason: The prior decision was not "on the merits" within the meaning of the issue preclusion doctrine. *See Republic of Ecuador*, 638 F.3d at 400 (preclusive issue must be part of final judgment "on the merits").

As noted, the sole issue the Second Circuit's prior judgment resolved was that "under Rule 19(b)[,] th[at] action could not proceed against the Thruway Authority and its executive director in the State's absence." 383 F.3d at 47. Such a dismissal for "failure to join a party under Rule 19," however, does not "*operate[] as an adjudication on the merits*," FED. R. CIV. P. 41(b) (emphasis added), "and thus, should not have preclusive effect," *Univ. of Pittsburgh v. Varian Med. Sys., Inc.*, 569 F.3d 1328, 1332 (Fed. Cir. 2009). That is exactly why a plaintiff can re-plead claims against responsible state officials and thereby "cure the indispensability defect" of failing to join a required sovereign party. *Nisqually*, 2008 WL 1999830, at *3. Even Defendants acknowledge that such a Rule 19 dismissal may be "cure[d]" in proper circumstances. Reply at 4. These authorities further confirm that, because the prior litigation was dismissed due to a defect in the parties rather than "on the merits," it has no preclusive effect on the current lawsuit that cures the

[3] Although the Nation cited *Ex parte Young* in relation to the Thruway claim, that was only in an attempt to demonstrate an analogy to its claim (which was not even asserted against state officials). *See* Br. of Appellant Seneca Nation at 26-27, No. 02-6185(L) (2d Cir. Nov. 13, 2002) (suggesting that "relief would be available against the Thruway authority" "[i]n the same manner" as *Ex parte Young*). *But see* Br. of Appellees at 43, No. 02-6185(L) (2d Cir. Dec. 18, 2002) (countering that *Ex parte Young* "is irrelevant with respect to the Thruway Authority and its executive director because, as the Nation acknowledges, . . . this Court has held that the Authority does not have immunity, Eleventh Amendment or otherwise").

indispensability defect.

C. The Magistrate Judge Erred In Declining To Accept As True The Nation's Well-Pleaded Factual Allegations

The Magistrate Judge's faulty issue preclusion ruling stemmed in large part from its refusal to accept as true the Nation's factual allegations regarding the easement's invalidity. The Magistrate Judge mistakenly concluded, based on an apparent belief in the "facial validity" of the easement, R&R at 15, that "[a]ny assertion about 'purported' easements or about the validity of the Thruway Easement calls for a legal conclusion and requires no deference under Rule 12," *id.* at 3. But the parties agree that "[e]asements are contracts," Mot. to Dismiss at 12, and it is well-established that "the *existence* of a contract"—as opposed to the meaning of its unambiguous terms—"is a factual determination." *In re FKF 3, LLC*, No. 13 CIV. 3601 (JCM), 2018 WL 5292131, at *5 (S.D.N.Y. Oct. 24, 2018) (emphasis added) (quoting *Bazak Int'l Corp. v. Tarrant Apparel Grp.*, 378 F. Supp. 2d 377, 389 (S.D.N.Y. 2005)); *see also Rice v. Sallaz*, 357 P.3d 1256, 1261 (Idaho 2015) (although the meaning of a contract is a question of law, "[w]hether a valid contract has been formed is generally a question of fact").

Here, the facts as pleaded by the Nation show that New York never obtained a valid easement because it never satisfied the federal statutory and regulatory requirements required to obtain one over the Nation's land. Indeed, as Magistrate Judge Heckman found in the prior litigation, as a factual matter "[i]t is *undisputed* that these [federal regulatory] requirements were never met." *See* 1999 R&R at 11 (emphasis added). Moreover, the prior litigation expressed no opinion on the validity of the easement (which went to the merits), but rather dismissed solely on Rule 19 procedural grounds. The Magistrate Judge was wrong to assume that allowing the Nation's claims to proceed would somehow "negat[e]" an issue of validity that was never addressed in the prior litigation. R&R at 16. Instead, the Nation's well-pleaded factual allegations

(and associated favorable inferences) that New York has no valid easement over Nation land because it failed to comply with federal requirements must be accepted as true for purposes of adjudicating New York's motion to dismiss. *See Perez*, 209 F. Supp. 3d at 597.

II. THE MAGISTRATE JUDGE ERRED IN FAILING TO FIND THAT THE NATION ADEQUATELY PLEADED CLAIMS UNDER *EX PARTE YOUNG*

Because the Magistrate Judge recommended dismissal on issue preclusion alone, the R&R failed to address Defendants' remaining arguments in favor of dismissal. Had it done so, it would have concluded that those arguments are meritless and that the Nation adequately stated a claim on which relief can be granted. As noted above, the Eleventh Amendment does not bar actions seeking prospective injunctive relief against state officials to prevent a continuing violation of federal law. Instead, the question of whether an *Ex parte Young* suit may proceed is merely a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). Because the Nation solely seeks prospective injunctive relief against state officials for violations of federal law, it properly pleaded its claims under *Ex parte Young*, and this Court should deny Defendants' motion to dismiss.

A. The Magistrate Judge Should Have Held That The Complaint Seeks Prospective Relief For Ongoing Violations Of Federal Rights

The Nation's complaint properly satisfies both "straightforward" elements of an *Ex parte Young* action because it [1] "alleges an ongoing violation of federal law and [2] seeks relief properly characterized as prospective." *Verizon Md. Inc.*, 535 U.S. at 645.

1. Ongoing Violations of Federal Law

The complaint alleges ongoing violations of federal law based on the State's "continuing operation of the Thruway without a valid easement" for the portion of the federally protected

Reservation land over which it lies. Compl. ¶ 3. As the Nation alleges, current operation of the Thruway violates the federal treaties and laws establishing the Reservation and protecting it against alienation, including the Canandaigua Treaty of 1794, Art. 3, which has long provided that the Nation's Cattaraugus Reservation shall not be disturbed "in the free use and enjoyment thereof." *See* Compl. ¶ 3. Current operation further violates the various federal regulatory requirements that comprehensively regulate rights-of-way across Indian lands such as the Reservation. *See* 25 U.S.C. § 323 and 25 C.F.R. Pt. 169. Such allegations of ongoing violations of a continuing violation of federal law are more than sufficient to survive dismissal. *See In re Dairy Mart*, 411 F.3d at 376 (noting that, on a motion to dismiss, a court "need not accept the defendant's recharacterization of the plaintiff's suit when, as here, the relief sought does not rest upon a disingenuous allegation of a continuing federal law violation").

Many courts, including this one, have recognized that similar claims may proceed under *Ex parte Young*. As noted, this Court has recognized that such a suit challenging the State's invalid use of Nation lands "may be brought" against State officials under *Ex parte Young*. *See Seneca Nation*, 397 F. Supp. at 686-687. So has the Eighth Circuit, which recognized that suits that "seek prospective injunctive relief against state officials in their official capacities for continuing violations of [a tribe's] federal treaty rights . . . fall squarely within the *Ex parte Young* exception to the Eleventh Amendment." *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 914 (8th Cir. 1997), *aff'd sub nom.*, 526 U.S. 172 (1999). The Fifth Circuit has likewise recognized that a claim challenging "whether the State may constitutionally impose an easement, or an encumbrance, on [a plaintiff's] fee simple estate" may proceed under *Ex parte Young*. *See Severance v. Patterson*, 566 F.3d 490, 495 (5th Cir. 2009).

Defendants argued that the complaint does not allege an "ongoing" federal-law violation

because "easements are contracts" and "[a]ny purported violation of federal law would have occurred at the time the parties entered into the contract." Mem. in Supp. of Mot. to Dismiss at 11 ("Mem."), Dkt. 16-1. But the core allegation in the complaint, which must be taken as true for purposes of the motion to dismiss, *see supra*, Part I.C., is that the parties never entered into a valid easement because no valid consent was obtained from the United States. *See* Compl. at ¶ 17. For that reason, and as the cases cited above make clear, it is not any historical contract violation but rather Defendants' *continued operation of the Thruway across the Nation's land without a valid easement* that constitutes ongoing violations of treaties and other federal laws within the meaning of *Ex parte Young*. The claims thus describe ongoing, not retrospective, violations of federal law.

2. Prospective Relief

In addition to alleging ongoing violations of federal law, the complaint seeks multiple forms of equitable relief properly characterized as "prospective" rather than damages. Specifically, the Nation seeks only forward-looking injunctions: (a) that Defendants "obtain a valid easement for the portion of the Nation's Reservation on which the Thruway is situated, . . . on terms that will *in the future* equitably compensate the Nation pro rata for *future* use of its lands," Compl. ¶ 4 (emphasis added); (b) in the alternative, that Defendants "be *enjoined from collecting* tolls for the portion of the Nation's Reservation on which the Thruway is situated without first obtaining a valid easement," *id.* (emphasis added); and (c) that the Comptroller "segregate and hold in escrow any *future* toll monies collected on the Thruway that are fairly attributable to the portion of the Thruway operated in violation of the Nation's federally protected property rights until the other Defendants obtain a valid easement," *id.* (emphasis added). In addition, the Nation seeks forward-looking declaratory relief regarding Defendants' federal-law violations. *See id.* None of this relief seeks compensation for past injuries or damages; instead, all of this equitable relief seeks to bring

operation of the Thruway into compliance with federal law prospectively.

Defendants argued before the Magistrate Judge that even though the complaint seeks solely prospective equitable relief, it should still be considered "retrospective" and equivalent to damages because "the requested relief becomes meaningless" without a "monetary component." Mem. at 12. This miscasts the required analysis, which focuses on whether relief is prospective, not whether it has anything to do with money. A claim that does nothing more than seek the equivalent of retrospective damages is prohibited. *See, e.g.*, *Ford v. Reynolds*, 316 F.3d 351 (2d Cir. 2003) (an injunction requiring the payment of agreed-upon honoraria, which was equivalent to a damages claim, impermissible under *Ex parte Young*). But as even Defendants admit, "relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment *even though accompanied by a substantial ancillary effect on the state treasury.*" Mem. at 10 (quoting *Papasan v. Allain*, 478 U.S. 265, 277-278 (1986) (emphasis added)).

Papasan forecloses Defendants' argument. In *Papasan*, the Supreme Court held that the Eleventh Amendment did not bar prospective relief for an *Ex parte Young* claim challenging a longstanding disparity in school funding that had its roots in historical transactions involving Indian lands. "This alleged ongoing constitutional violation—the unequal distribution by the State of the benefits of the State's school lands—is precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Young*." *Papasan*, 478 U.S. at 282. Even though the source of the present disparity was a specific historical event—namely, the breach of a trust obligation—that did not prevent the Court from allowing plaintiffs to sue to address *continuing* federal-law violations on a *prospective* basis, despite the fact that the prospective relief would require the defendant to pay money. That was because any "remedy to eliminate this current disparity, even a remedy that might require the expenditure of state funds, would ensure

'compliance in the future with a substantive federal-question determination' rather than bestow an award for accrued monetary liability." *Id.*

As in *Papasan*, the claims here seek only "compliance in the future" with federal law, not "an award for accrued monetary liability" or compensation for any past acts. The Nation seeks to remedy a continuing encroachment on its lands through the negotiation of a valid easement. Requiring a valid easement to comply with federal law is unquestionably prospective relief, no matter the "ancillary effect on the state treasury." *Papasan*, 478 U.S. at 278.

B. The Magistrate Judge Should Have Held That *Idaho v. Coeur d'Alene Tribe* Does Not Bar The Nation's Claims

Defendants have also argued that this suit runs afoul of *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). But subsequent Supreme Court precedent, particularly *Verizon Md. Inc.*, 535 U.S. at 645, has effectively limited *Coeur d'Alene* to the "particular and special circumstances" of that case. Because those circumstances are not present here, *Coeur d'Alene* is inapposite.

Coeur d'Alene involved a tribe that sought to establish its sovereignty over, and exclusive right to, certain submerged lands that had been claimed and governed by Idaho for centuries. Justice O'Connor's concurrence, the controlling opinion in a fractured decision, emphasized certain distinguishing facts that, in her view, took the case outside of a typical *Ex parte Young* action. In particular, she observed that the requested relief would not merely deprive the State of possession, but "bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters." *Coeur d'Alene*, 521 U.S. at 282. The problem was that "the Tribe does not merely seek to possess land that would otherwise remain subject to state regulation, or to bring the State's regulatory scheme into compliance with federal law," but rather to deprive the State of its sovereignty over the submerged lands, interfering with the "State's ability to regulate use of its navigable waters." *Id.* at 289.

The Second Circuit has recognized the narrow scope of *Coeur d'Alene* and has applied it only once, when it "directly control[led]" on "virtually identical" facts. *Western Mohegan Tribe & Nation v. Orange Cty.*, 395 F.3d 18, 23 & n.4 (2d Cir. 2004); *see id.* at 23 (noting that the Second Circuit has repeatedly "declined to extend *Coeur d'Alene*'s holding"). The *Western Mohegan* court concluded that the facts alleged in that case—including the tribe's request to deprive the State of both title and sovereign authority over submerged lands—involved the same "particular and special circumstances" in *Coeur d'Alene,* and that the relief sought was thus "the virtually identical 'unique divestiture of the state's broad range of controls over its own lands' that was at issue in *Coeur d'Alene*." *Id.* at 22, 23 n.4; *see id.* at 23 (recognizing that both cases involved the same "core issues of land, state regulatory authority, and sovereignty").

Taken together, *Coeur d'Alene* and *Western Mohegan* thus stand for the proposition that unless a suit possesses the same unusual distinguishing features—specifically, (1) a dispute over submerged lands; (2) threatened divestiture of land title (not mere possession); and (3) threatened divestiture of jurisdiction and sovereignty—*Coeur d'Alene* does not apply. But this case has none of those features.

First, unlike *Coeur d'Alene* and *Western Mohegan*, this case involves no submerged lands or navigable waters. That is critical. As courts have recognized, "[t]he extent to which *Coeur d'Alene* is limited to its 'particular and special circumstances'" with regard to submerged lands "cannot be overstated," in that submerged lands have a "unique status in the law and [are] infused with a public trust the State itself is bound to respect.'" *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1054 n.8 (9th Cir. 2001) (noting that such lands "are tied in a unique way to sovereignty" and that "navigable waters uniquely implicate sovereign interests"); *accord Lacano Invs., LLC v. Balash*, 765 F.3d 1068, 1075-1076 (9th Cir. 2014); *Gila River Indian Cmty.*

v. Winkelman, No. CV 05-1934-PHX-EHC, 2006 WL 1418079, at *2 (D. Ariz. May 22, 2006) ("*Coeur d'Alene* only limits the application of the *Young* exception when a state's control of submerged lands is challenged.") (citing *Western Mohegan,* 395 F.3d at 22 n.3).

Second, unlike *Coeur d'Alene* and *Western Mohegan*, which both sought "unique divestiture of the state's broad range of controls over its own lands," the Nation already has undisputed title to the restricted fee lands comprising its Reservation. *See Coeur d'Alene Tribe*, 521 U.S. at 290 (O'Connor, J., concurring in part and concurring in judgment) (noting that there is a distinction "between *possession* of the property and *title* to the property"). Nor does this case implicate the "exclusive use, occupancy, and right" to property, either. *Western Mohegan*, 395 F.3d at 21. The Nation does not seek to alter the possession or use of the land, but merely seeks to have a valid easement concluded on equitable terms. In *Severance*, the Fifth Circuit explained that a suit challenging the State's claim to an easement "is not the functional equivalent of a quiet-title action: Title to the properties at issue rests with [plaintiff], not the State." 566 F.3d at 495. Where "Officials do not claim title" but instead "[t]he issue is whether the State may constitutionally impose an easement, or an encumbrance, on [plaintiff's] fee simple estate," "the 'particular and special circumstances' of *Coeur d'Alene* . . . are not present." *Id.* Because the dispute in this case is also over the validity of an easement, and will not divest the State of title to any property, *Coeur d'Alene* does not apply.

Finally, unlike *Coeur d'Alene* and *Western Mohegan*, granting the relief sought by the Nation will not "strip the State of any of its jurisdiction or authority to regulate the land." *Lipscomb v. Columbus Mun. Separate. Sch. Dist.*, 269 F.3d 494, 502 (5th Cir. 2001); *see Mille Lacs Band,* 124 F.3d at 914 (claims that seek merely to bring the State "into compliance with federal law," rather than "to eliminate altogether the State's regulatory power," may proceed against state

officers) (emphasis omitted). The Second Circuit has recognized that crucial distinction between a suit that attacks a sovereign's authority versus one that implicates lesser interests. In *In re Deposit Ins. Agency*, 482 F.3d 612, 620 (2d Cir. 2007), the court held that a bankruptcy petition seeking assets allegedly held by the State in violation of federal law could proceed because it did not seek to oust the State of jurisdiction over property. "More was at stake [in *Coeur d'Alene*] than simple possession or other incidents of ownership," but rather "relief that 'would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters,' extinguishing state regulatory control over a 'vast reach of lands and waters long deemed by the State to be an integral part of its territory.'" *Id.*; *accord In re Dairy Mart*, 411 F.3d at 371-372; *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 372 (7th Cir. 2010); *Dakota, Minn. & E. R.R. Corp. v. S. Dakota*, 362 F.3d 512, 517 (8th Cir. 2004).

Nothing of the sort is sought here. Congress extended concurrent jurisdiction to the State of New York over the Nation's lands in 1948. 25 U.S.C. §§ 232-233; *see also United States v. Cook*, 922 F.2d 1026, 1033 (2d Cir. 1991). This lawsuit will not affect that authority. Instead, the effect of this suit will be to require Defendants to obtain an easement for the Thruway that complies with federal law. At most, the requested relief will affect Defendants' claimed interest in future toll monies associated with the portion of the Thruway that crosses the Reservation; it will not shift title to, or jurisdiction over, any navigable waters (or even any lands).[4]

CONCLUSION

The Court should decline the Magistrate Judge's recommendation and deny Defendants' motion to dismiss.

[4] The Magistrate Judge appropriately did not address Defendants' attempt to invoke laches, which they admit is an affirmative defense that "ordinarily cannot be the basis for a Motion to Dismiss," where facts are accepted as true and inferences are resolved in favor of the plaintiff. Mem. at 17; *see, e.g.*, *I.O.B. Realty, Inc. v. Patsy's Brand, Inc.*, No. 16 CIV. 7682 (LLS), 2017 WL 2168815, at *3 (S.D.N.Y. May 16, 2017).

DATED this 16th day of January 2019.

Respectfully submitted,

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LOCAL RULE 72(C) CERTIFICATION

Pursuant to L.R.Civ.P.72(c), I hereby certify that the above objections do not raise new legal or factual arguments that were not previously raised to the Magistrate Judge.

/s/ James E. Tysse
James E. Tysse

ADDENDUM

#244

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FILED
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U.S. DISTRICT COURT
W.D.N.Y.-BUFFALO

THE SENECA NATION OF INDIANS,

Plaintiff,

TONAWANDA BAND OF SENECA INDIANS,

Plaintiff-Intervenor,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

ORDER
93-CV-688A

STATE OF NEW YORK, et al.,

Defendants.

This case was referred to Magistrate Judge Carol E. Heckman pursuant to 28 U.S.C. § 636(b)(1), on November 22, 1993. The parties subsequently filed cross-motions for summary judgment on count two of the second amended complaint in which plaintiff Seneca Nation of Indians ("Seneca Nation") seeks to invalidate an easement through the Cattaraugus Reservation granted in 1954 by the Seneca Nation to the State of New York by and through the New York State Thruway Authority (the "Thruway

#244

claim"). Defendants also filed a motion to dismiss the damages portion of the United States' claim in intervention regarding Grand Island and other islands in the Niagara River (the "Grand Island claim") on statute of limitations grounds.

On July 12, 1999, Magistrate Judge Heckman filed a Report and Recommendation, recommending that summary judgment be granted to the defendants on the Thruway claim, and that the defendants' motion to dismiss the damages portion of the Grand Island claim be denied.

The parties filed objections to the Report and Recommendation and oral argument on the objections was held on November 9, 1999.

Pursuant to 28 U.S.C. § 636(b)(1), this Court must make a de novo determination of those portions of the Report and Recommendation to which objections have been made. Upon de novo review of the Report and Recommendation, and after reviewing the submissions and hearing argument from the parties, the Court: (1) adopts the Magistrate Judge's proposed finding that the Thruway claim should be dismissed pursuant to Fed. R. Civ. P. 19 because the State of New York is an absent and indispensable party[1];

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[1] In its objections to the Magistrate Judge's recommendation that the Thruway claim be dismissed, the Seneca Nation raises an argument not raised before the Magistrate Judge. The Seneca Nation argues for the first time that even if the standards under Rule 19(a) are met with regard to the State of New York, the case should still be able to proceed against the New York State Thruway Authority and its Executive Director, insofar as the Seneca

(2) declines to adopt, at this time, the Magistrate Judge's proposed finding that the Secretary of the Interior did not approve the right-of-way agreement; (3) declines to adopt, at this time, the Magistrate Judge's proposed finding that the requirements of the Non-Intercourse Act were not lifted by either the 1875 Act or the 1950 Act; (4) declines to address defendants' argument that the subsequent acts by the Seneca Nation and/or its members ratified the easement agreement; and (5) adopts the Magistrate Judge's proposed finding that the damages portion of the Grand Island claim is not barred by the statute of limitations in 28 U.S.C. § 2415(b).

Accordingly, the Seneca Nation's motion for partial summary judgment on the Thruway claim is denied, defendants' motion for partial summary judgment dismissing the Thruway claim is granted and defendants' motions to dismiss the damages portion of the United States' complaint in intervention are denied. The case is referred back to Magistrate Judge Heckman for further proceedings.

Nation seeks to enjoin those entities from interfering with its possession of the disputed property. Because the Seneca Nation did not raise this argument before the Magistrate Judge, it is barred from raising it now. See Paterson-Lietch Co. v. Massachusetts Mun. Wholesale Elec. Co., 840 F.2d 985, 990 (1st Cir. 1988); Smythe v. Nolley, 1997 WL 714238 (W.D.N.Y. Sep. 12, 1997).

IT IS SO ORDERED.

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

Dated: November 17, 1999